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**JUDICIAL REVIEW OF REMEDIES
AWARDED IN PRIVATE ARBITRATION OF
EMPLOYMENT DISCRIMINATION AND RETALIATION CLAIMS**

In a significant and unusual case involving arbitration of employment discrimination and retaliation claims, the Wisconsin Supreme Court recently held oral argument in a case that could have far-reaching implications in other jurisdictions. Dawn M. Sands v. Menard, Inc., 2008AP1703 (Wis. Sup. Ct. 2010). The Wisconsin Supreme Court will decide two issues: (i) whether a court may vacate or adjust remedies awarded by an arbitrator, in this case ordering the employer to reinstate its former chief in-house lawyer who had been terminated; and (ii) whether a client's fundamental right to select legal counsel of its own choosing outweighs the remedy of reinstatement when in-house lawyers or lawyers employed by law firms bring discrimination or retaliation claims.

The case also is noteworthy because of the large monetary award to the claimant in the arbitration – *\$1.6 million, including \$900,000 in punitive damages, and prevailing party attorney's fees*, as well as reinstatement to the claimant's former position. Importantly, this large money award stands in contrast to an increasingly prevalent criticism of arbitration for employment disputes – namely, that monetary awards are limited and arbitration is unfair to individuals.

Key Facts and Summary of Law

The former general counsel of Menard, Inc. (the well-known home improvement retailer) was terminated from employment following a dispute over compensation. Pursuant to an arbitration agreement, the general counsel, Dawn Sands, submitted her claims to an arbitration panel, alleging that Menard violated the Equal Pay Act by paying her less than male employees and that Menard retaliated against her for complaining about the discrimination in violation of the Equal Pay Act, Title VII and the Wisconsin Fair Employment Act. Sands earned about \$70,000 annually as Menard's chief in-house lawyer. The arbitration panel found that she was paid less than a similarly qualified male employee. The arbitration panel also found that Menard terminated Sands in retaliation for complaining of discrimination.

The three-person arbitration panel awarded Sands the following: (i) \$1.6 million in damages, more than half of which was in punitive damages; (ii) prevailing party attorney's fees; and (iii) reinstatement to her former position at a new salary of \$175,000 annually plus bonus. In a subsequent lawsuit, Menard has sought to vacate that portion of the arbitration award requiring reinstatement of its former general counsel. While the parties had agreed to binding arbitration, the arbitration agreement was silent regarding the arbitration panel's specific authority to award reinstatement. Importantly, however, the parties had agreed that "[T]he ruling of a majority of the Arbitration Panel shall be binding and final." Both the Wisconsin trial and appellate courts refused to vacate or adjust the arbitration award, finding no reason why a client's recognized right to select its own legal counsel should trump federal law providing reinstatement as a remedy in employment discrimination and retaliation cases. Sands v. Menard, Inc., 318 Wis. 2d 206 (Wis. App. Ct. 2009).

The Wisconsin Supreme Court will decide whether a court may vacate or adjust an arbitration panel's award that a claimant be reinstated to her former job, above and beyond the large monetary award. The Court will not determine whether the monetary award is excessive – that issue has not been appealed. Menard contends that the arbitration panel's award of reinstatement violates its basic right to select legal counsel of its own choosing and such a remedy constitutes a manifest disregard of fundamental legal principles. Menard also emphasized in oral argument that the large monetary award is sufficient relief. Sands emphasized in oral argument that the reinstatement award should stand based on well-established judicial deference to arbitration, particularly when the parties specifically agreed "to resolve all disputes" through arbitration with the arbitral ruling to be "binding and final." Sands will have to overcome that she had not sought reinstatement, and that reinstatement does not appear to be a workable solution for either party.

Implications for Employers

- The Wisconsin Supreme Court is expected to provide useful guidance on the extent to which, if at all, courts are permitted to vacate or adjust unusual relief awarded in arbitrations of employment discrimination and retaliation claims. A decision declining to change the award will further bolster the substantial deference that courts give to the arbitration process. On the other hand, a decision changing the award will establish limits on the relief available in arbitration.
- The very large money award by the three-person arbitration panel in this case, \$1.6 million, including \$900,000 in punitive damages, runs counter to critics of arbitration for employment claims who argue that monetary awards in arbitration are limited and that arbitration is unfair to individuals. Notably, the employer in this case did not seek to vacate or adjust the substantial monetary relief.
- The Wisconsin Supreme Court may, as an issue of first impression, substantively address the novel question of whether reinstatement is a remedy for in-house lawyers or lawyers employed by law firms under the Equal Pay Act and Title VII. The clients' fundamental right to select legal counsel of their own choosing may outweigh the remedy of reinstatement, and provide a powerful defense for employers defending legal departments or law firms in discrimination and retaliation cases.

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March 1, 2010

Smith O'Callaghan & White is legal counsel for other law firms in various employment matters. This update should not be construed as a viewpoint on the recommended disposition of this case.